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CASE NO. 82-922

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

NED LUTZ,

Petitioner,

vs.

STATE OF OHIO,

Respondent.

(ON WRIT OF CERTIORARI FROM
THE SUPREME COURT OF OHIO)

BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

The following statement of the case is necessary to correct the omissions in the statement of the petitioner.

While petitioner's motion to dismiss the indictment filed on June 17, 1981, was pending before the trial court, petitioner filed a motion on June 23, 1981, to vacate the July 7, 1981, trial date. The trial court granted this motion and reassigned the case for hearing on July 14, 1981, at which time the trial commenced. Except for parts of two days, petitioner has been free on bond during the entire proceedings.

On July 13, 1981, the trial court overruled the petitioner's motion to dismiss filed June 17, 1981.

The defendant was found guilty by a jury and was sentenced to confinement in an Ohio penitentiary for a term, the minimum of which would be one (1) year, the maximum of which would be ten (10) years. However, the sentence of imprisonment in the Ohio penitentiary was

suspended and the defendant was placed on probation for a period of five (5) years ending September 14, 1986. As a term of that probation, the defendant was sentenced to be incarcerated in the Coshocton County Justice Center for a period of sixty (60) days.

Defendant filed a Notice of Appeal on September 15, 1981. The Court of Appeals for Coshocton County, Ohio, Fifth Appellate District, by Judgment Entry filed July 12, 1982, overruled all six assignments of error alledged by the defendant and the verdict of judgment of the Coshocton County Court of Common Pleas was affirmed.

The defendant appealed the decision of the Court of Appeals to the Ohio Supreme Court by Notice of Appeal timely filed July 26, 1982. On October 6, 1982, the Ohio Supreme Court dismissed the appeal for the reason that no substantial constitutional question existed.

On October 6, 1982, the Ohio Supreme Court overruled petitioner's Motion for Leave to Appeal from the Court of Appeals for Coshocton County.

This matter is now before this court on a petition for writ of certiorari from the Supreme Court of Ohio.

SUMMARY OF ARGUMENT

The question presented fails to rise to the level of a substantial federal question and the matters raised have already been addressed by this Court.

The continuance granted respondent was reasonable and therefore was a proper extension of a trial time.

Any period of delay necessitated by petitioner's motion to dismiss is a proper extension of trial time.

The Ohio Rules of Superintendence do not deal with the substantive rights in this case which are prescribed by statutes which are controlling.

ARGUMENT

Supreme Court Rule 17 provides in pertinent part:

"Rule 17. Considerations Governing Review on Certiorari.

1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered . . . . .

> (b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.
>
> (c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court."

In the instant case, the Ohio Supreme Court has not decided any federal question in conflict with any other state court of last resort or of a federal court of appeals. Further, all important questions of federal law which petitioner alludes to in his petition have already been settled by this Court. The petitioner has failed to raise a substantial federal question and pursuant to the guidelines set forth in Supreme Court Rule 17, this Court should deny the petition for writ of certiorari.

Respondent was granted an ex parte order continuing the trial date twenty-one days because an important unnamed State's witness would suffer a hardship for himself and ten other people arising out of a preplanned and paid-for

vacation trip out of the United States during the scheduled trial date of June 16, 1981. When the respondent became aware of this fact on June 9, 1981, it filed a Motion for Continuance the next court day.

On June 10, 1981, 248 of Ohio's 270 days had elapsed when respondent sought and was granted a continuance from June 16, 1981 to July 7, 1981 on the grounds that a material and critical State's witness would be caused hardship by the June 16, 1981 trial date. There was full compliance with the Ohio statutory speedy trial scheme which is one of the most rigorous and protective in this nation.

The absence of prejudice to the petitioner is best demonstrated by petitioner's request for continuance from July 7, 1981 to July 14, 1981.

This Court has consistently recognized the applicability to the States of the 6th Amendment speedy trial provisions via the due process clause of the 14th Amendment; however, petitioner neither suggests prejudice nor proffers any arguments in support thereof. Petitioner is asking the Court to set aside the Ohio Supreme Court's interpretation of the Ohio speedy trial statutes and substitute its interpretation of such statutes. This is requested since petitioner cannot make his case rise to a federal constitutional level.

The Ohio Supreme Court reviewed a number of cases dealing with Section 2945.72 (H) R.C. in *Elmwood Place v. Denike*, 56 Ohio St. 2d 427, 10 Ohio Op. 3d 528, 384 N.E. 2d 707 (1978), and stated that an initial determination must be made as to whether a delay of trial is facially unreasonable and only then would the record need to affirmatively show sufficient facts to support the reasonableness of the order. Under the guidelines set down by the court in *Denike*, supra, the continuance was not facially unreasonable. Additionally, the facts set forth in respondent's memorandum attached to the motion for continuance provided the record with sufficient detail to

demonstrate the necessity and reasonableness of the continuance.

In the present case, unlike *State v. Reeser*, 63 Ohio St.2d 189, 407 N.E.2d 25 (1980), there was no ploy by the respondent or the trial court to undercut the statutory requirements.

The respondent informed the Court in the memorandum that the witness in question would be back in the United States and Coshocton County, Ohio by June 22, 1981, and that a trial date after that time would relieve that witness's hardship and still comply with Ohio's statutory trial time of 270 days. The respondent was in good faith attempting to try the case within the time limits established by the Ohio Revised Code.

When the actions of the respondent and the trial court are weighed in light of the factors set forth by this Court in *Barker v. Wingo*, 407 U.S. 514 (1972) and *Moore v. Arizona*, 414 U.S. 25 (1973), it is clear that petitioner's right to a speedy trial were protected and no prejudice befell the petitioner.

The filing of the motion to dismiss by petitioner on October 21, 1980, tolls the time running against the respondent without the necessity of the court affirmatively finding, or the respondent proving, that the motion, standing alone, delayed the proceedings, *State v. Walker*, 42 Ohio App. 2d 41, 71 Ohio Op.2d 238 (1974). The time between the filing of the motion by the petitioner and the disposition of that motion is the delay necessitated by reason of said motion.

State v. Martin, 56 Ohio St. 2d 289 (1978), cited by the petitioner at Page 8 of his Petition for Writ of Certiorari, clearly supports the proposition that the filing of the motion to dismiss by the petitioner would extend the time for trial pursuant to 2945.72(E)R.C.

Rule 8(B) of the Rules of Superintendence of the Supreme Court of Ohio does not deal with the substantive rights of the petitioner which are prescribed by statutes

relating to rights to speedy trial and discharge. Those statutes deal with the substantive rights of an accused and take precedence over procedural or Superintendency Rules of the State Supreme Court. *State v. Westbrook*, 47 Ohio App.2d 211 (1975).

In addition, Superintendency Rule 8(B) has no condition specifying that failure of compliance justifies the discharge of an accused. *State v. Lacy*, 46 Ohio App. 2d 215, 75 Ohio Op.2d 376 (1975).

CONCLUSION

For the reasons stated, the question presented fails to rise to the level of substantial federal question and as any constitutional issues raised by the petitioner have already been addressed by this Court. The matter raised is of little public importance.

The continuance granted respondent was reasonable under the circumstances and therefore a proper extension of trial time under Section 2945.72(H) R.C.

Where petitioner filed a motion to dismiss, any period of delay necessitated by reason of that motion qualified as a proper extension of trial time under Section 2945.72(E) R.C.

Rule 8(B) of the Ohio Supreme Court's Superintendence Rules does not deal with the substantive rights of petitioner which are prescribed by statutes relating to rights to speedy trial and discharge.

Wherefore, respondent respectfully submits that this Court deny the petition for writ of certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Brief in Opposition was served upon the Counsel for Petitioner, James R. Cooper, Esquire, Morrow, Gordon & Byrd, 33 West Main Street, P.O. Box 816, Newark, Ohio 43055, by United States Regular Mail this 4th day of January, 1983.

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